Supreme Court, U.S.
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No. 99-1980

IN THE

Supreme Court of the United States

NEXTWAVE PERSONAL COMMUNICATIONS INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF URBAN COMM-NORTH CAROLINA, INC., DEBTOR-IN-POSSESSION, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of Amicus Curiae	1
Summary of Argument	3
Argument	4
I. No "Regulatory Purpose" Was Served by the FCC's Attempted Forfeiture of the Licenses	4
II. The FCC'S Cross-Over	8
III. Avoidance	12
IV. Recent Pronouncements by this Court Support the Petition	13
Conclusion	16

TABLE OF CITED AUTHORITIES

Page

Cases:

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 14

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 120 S. Ct. 1942 (May 30, 2000) ... 14

Kawaauhau v. Geiger, 523 U.S. 57 (1998) 14

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 15

Urban Comm-North Carolina, Inc. v. FCC (In re Urban Comm-North Carolina, Inc.), Ch. 11 Case No. 98-B-10086, Adv. No. 99/8125A (Bankr. S.D.N.Y.) 2

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 14

Statutes:

11 U.S.C. § 101, *et seq.* 1

11 U.S.C. § 106(a) 14

11 U.S.C. § 106(a)(1) 15

11 U.S.C. § 106(a)(2)(6) 15

Cited Authorities

	Page
11 U.S.C. § 506(b)	14
11 U.S.C. § 506(c)	14
11 U.S.C. § 523(a)(6)	14
11 U.S.C. § 548	13
28 U.S.C. § 158(d)	14
28 U.S.C. § 1291	14
28 U.S.C. § 1292	14
28 U.S.C. § 1334(b)	13, 14, 16
28 U.S.C. § 2342	13, 15
47 U.S.C. § 309(j)	9
47 U.S.C. § 402	13
47 U.S.C. § 402(b)	15
Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-392 (1993)	9
Pub. L. No. 95-598, 92 Stat. 2549 (1978)	15
Pub. L. No. 98-353, 98 Stat. 364 (1984)	15

Cited Authorities

Page

United States Constitution:

Article III 15

Other Authorities:

1 Collier on Bankruptcy, ¶ 1.02[2] (Lawrence P. King ed., 15th ed. revised 2000) 16

5 *Collier On Bankruptcy*, ¶ 548.01 (Lawrence P. King ed., 15th ed. revised 2000) 13

H. Rep. 106-398 11

H.R. Rep. No. 103-111 (1993) 8

H.R. 2670 11

1999 House Roll No. 387 11

145 Cong. Rec. 10835 11

145 Cong. Rec. D949-50 (September 8, 1999) 11

145 Cong. Rec. D1166 (October 20, 1999) 11

145 Cong. Rec. H7383-7384 (August 5, 1999) 11

145 Cong. Rec. H10768 11

Cited Authorities

	Page
145 Cong. Rec. S9046 (July 22, 1999)	11
145 Cong. Rec. S9068 (July 22, 1999)	11
145 Cong. Rec. S10540 (September 8, 1999)	11
S. 1217, 106th Cong. § 618 (1999)	10, 11

I

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, Urban Comm-North Carolina, Inc. ("UC-NC"), a small, start-up business formed by a group of minority individuals, has an interest in the Petition because it, just as the Petitioner, NextWave Personal Communications, Inc. ("NextWave"), is a holder of C Block spectrum licenses obtained at auction[2] and it, just as NextWave, was foreclosed from raising the capital necessary to meet its construction costs and payment obligations to the FCC and, therefore, found it necessary to seek the protection of Chapter 11 of Title 11 of the United States Code ("the Bankruptcy Code").[3] Thereafter, UC-NC

1. Counsel of record for the parties in this case have consented to the filing of this brief amicus curiae. In compliance with Supreme Court Rule 37.2, their letters of consent have been lodged with the Court. Pursuant to Supreme Court Rule 37.6, amicus UC-NC states that no counsel for any party in this case authored this brief in whole or in part and that no monetary contribution to the preparation or submission of this brief was received from any person or entity other than the amicus curiae or its counsel.

2. In May of 1996, after 184 rounds of bids, Urban Communicators P.C.S. Limited Partnership ("UCPCS"), the parent of UC-NC's parent, Urban Comm-Mid-Atlantic, Inc., Debtor-in-Possession, was the high bidder at a Federal Communications Commission ("FCC") auction for the right to apply for C Block licenses within ten basic trading areas ("BTAs") in North Carolina. UCPCS's bids, which totaled $74.6 million, were consistent in amount with bids for licenses in similar BTAs throughout the country. UCPCS assigned its C Block license application to UC-NC. The FCC conditionally granted the licenses to UC-NC, which made the required downpayment and later executed notes payable to the FCC in the amount of the then outstanding balance.

3. 11 U.S.C. § 101, *et seq.*, as amended.

commenced an avoidance action by adversary complaint against the FCC to value the licenses as at the time UC-NC incurred the obligations to the FCC and avoid the difference as a fraudulent conveyance.[4]

As in NextWave's action, the FCC moved in the District Court to withdraw the reference of the Chapter 11 case to the Bankruptcy Court and to dismiss the avoidance action. The District Court denied the motion to withdraw and left it to the Bankruptcy Court to decide the motion to dismiss. Upon remand of its Chapter 11 case to the Bankruptcy Court, the Bankruptcy Judge advised the parties that he would defer decision on the FCC's motion to dismiss UC-NC's adversary proceeding pending the determination by the U.S. Court of Appeals for the Second Circuit of the appeal in the NextWave action. UC-NC's adversary proceeding and the FCC's motion to dismiss it are still pending. Recently, Honorable Richard L. Bohanon, U.S. Bankruptcy Judge, continued the deferral pending this Court's determination of the NextWave writ of certiorari.

Whether UC-NC can successfully reorganize, complete the build-out of its personal communication services ("PCS") system and supply to a technology-deprived population in North Carolina the wireless communication services Congress wanted to foster, or will face liquidation, will turn on the decision by this Court in the instant action.

The importance of the issues presented in the Petition and in this brief is attested to by the fact that more than

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4. *Urban Comm-North Carolina, Inc. v. FCC (In re Urban Comm-North Carolina, Inc.)*, Ch. 11 Case No. 98-B-10086, Adv. No. 99/8125A (Bankr. S.D.N.Y.).

seventy-five percent of the successful bidders at the C Block auctions, holding more than ninety percent of the C Block licenses, have sought relief under Chapter 11 of the Bankruptcy Code largely due to the manner in which the FCC conducted the license auctions. None of the successful bidders have been able to raise the capital required to construct their systems and meet their payment obligations to the FCC, due to no fault of their own. At stake here is the future of the licensees, as well as the timeliness with which the most technology-deprived parts of the public will have access to PCS services.

SUMMARY OF ARGUMENT

The first issue framed in the lower courts is whether the fact that the FCC conducted the C Block auctions pursuant to its mandate to allocate those licenses so as to assure the most efficient use of spectrum immunizes the FCC from the application of the Bankruptcy Code, more specifically, an adversary proceeding seeking to avoid the difference between the auction bids and the actual value of the PCS licenses based on the FCC's constructive fraud. The FCC contends that the full auction bid prices must be paid, at pain of forfeiture of the licenses as well as the hundreds of millions of dollars paid by the successful bidders at the C Block auctions, in order to accomplish the FCC's regulatory purpose of ensuring the most efficient spectrum use; that its determination in that regard is regulatory; and that the Bankruptcy Courts lack jurisdiction to countermand that decision. The Second Circuit has accepted the FCC's contention. UC-NC submits that NextWave's Petition should be granted and, on appeal, the Second Circuit's decision should be reversed for the reasons stated in the Petition and for the following reasons:

(1) the FCC's insistence on full payment from bidders who were deprived of the ability to pay in full, and, therefore, damaged, by the FCC's actions, manifestly does not serve to further the Congressional intent to assure efficient use of spectrum ("I" below);

(2) regardless of any asserted "regulatory purpose" by the FCC for insisting on full payment, the Bankruptcy Court has jurisdiction to modify the terms of these auction transactions to prevent or cure constructive fraud ("II" below);

(3) the avoidance remedy of the Bankruptcy Code provides the ideal solution to the conundrum with which the parties — the bidders *and* the FCC — are faced ("III" below); and

(4) recent pronouncements by this Court support the reasons urged by NextWave for granting the Petition ("IV" below).

ARGUMENT

I. No "Regulatory Purpose" Was Served by the FCC's Attempted Forfeiture of the Licenses

After the initial auctions of the C Block licenses were concluded in May 1996, but before the licenses were issued by the FCC to the successful bidders and financing could be obtained, the FCC in June 1996 announced that it would

auction three blocks of spectrum (the D, E and F Blocks) in the same BTAs as, and competing with, the C Block licenses.[5]

The ensuing auctions for additional licenses of PCS sepctrum, commencing in August 1996 and ending in January 1997,[6] flooded the market for PCS spectrum and drove down the value of PCS licenses. While the successful bids for C Block licenses had averaged $1.33 per MHz-Pop[7] for the main auction ending May 6, 1996, and $1.94 per MHz-Pop for a re-auction in July 1996, the average of the high bids for the new licenses in the same BTAs for which C Block licenses were granted was only $.33 per MHz-Pop[8]. This

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5. *FCC v. NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.)*, 200 F.3d 43, 47 (2d Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3774 (U.S. June 9, 2000) (No. 99-1980).

6. *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 277, 283 (Bankr. S.D.N.Y. 1999), *aff'd*, 241 B.R. 311 (S.D.N.Y. 1999), *rev'd and remanded*, 200 F.3d 43 (2d Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3774 (U.S. June 9, 2000) (No. 99-1980).

7. $/MHz-Pop is a generally accepted industry measurement standard. *See NextWave*, 200 F.3d at 47.

> The MHz, or megahertz of radio frequency, in question determines the carrying capacity of a block of wireless spectrum. . . . One 'Pop' represents 1000 persons within the geographic area covered by a particular licensing block. $/MHz-Pop therefore measures the amount paid for a license that would allow the provision of a particular level of communications data to a particular number of people.

Id. at 47 n.4.

8. *NextWave*, 235 B.R. at 284.

difference in the bids in identical markets demonstrates that the FCC, by auctioning additional PCS spectrum immediately after the C Block auctions closed, drastically depressed the market value of all such licenses. Predictably, the C Block licensees found that, in light of the disparate values placed on equivalent PCS spectrum licenses, financing for the licenses and the build-out of their PCS systems could not be obtained. In the words of United States Bankruptcy Judge Adlai S. Hardin, Jr.,

> NextWave was not the only C block licensee to find the public capital markets closed. Approximately $1.6 billion of public financing was sought by C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public market. To this date [May 1999], nearly thee years after the 1996 auction and reauction, less than 10% of the C block licences awarded by the FCC have been placed in service.[9]

The FCC, recognizing its error, issued a payment moratorium in order to determine how to remedy the situation it had created. After the expiration of the payment moratorium, however, the FCC decided to insist upon full payment of auction bids for any licenses the license holders chose to keep.[10]

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9. *NextWave*, 235 B.R. at 286.

10. *NextWave*, 200 F.3d at 48.

The Second Circuit accepted the FCC's contention that

> NextWave's inability to follow through on its financial undertakings had more than financial implications. It indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the Licenses [defined] efficiently for the benefit of the public in whose interest they were granted. It meant, in regulatory terms, that NextWave was not entitled to the Licenses.[11]

The plain fact is that the inability of NextWave and those standing in the same position as NextWave to pay the bid prices for the PCS licenses had nothing to do with their potential efficiency in utilization of the licenses but had everything to do with the FCC's conduct of the subsequent auctions of PCS spectrum. The C Block licensees failed to raise the necessary financing because the FCC had not been sensitive to the needs of the winning bidders to go into the public markets to raise the necessary capital, a fact inherent in the very criteria by which they were chosen. The FCC knew or should have known when it auctioned the C Block licenses to minimally capitalized and minority owned enterprises and financed the winning bids, that, by definition, the ability of the winning bidders to pay (*i.e.*, raise the necessary capital in a competitive capital market) would wax and wane with the volatile market for public financing. Nonetheless, the FCC proceeded to conduct subsequent auctions of PCS spectrum with complete disregard of this fact and scheduled subsequent auctions in a manner that virtually assured that the C Block bidders would be unable

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11. *Id.* at 54.

to raise the necessary capital. The inability to raise the necessary capital and the need for relief under Chapter 11 would have been the experience of any small business meeting the eligibility criteria for the C Block licenses and was, in fact, the experience of virtually all of those who did bid successfully.

II. The FCC'S Cross-Over

In consonance with prevalent trends towards deregulation and reliance on market forces instead of presumed bureaucratic wisdom, and with a view towards containment of administrative costs and realization of revenue from the national resources,[12] Congress authorized the FCC to allocate radio spectrum licenses by competitive bidding rather than, as in the past, by administrative

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12. President Clinton proposed in his budget submitted to Congress [for fiscal year 1994] that the FCC be given authority to use competitive bidding as a source of revenues and as a means of improving the spectrum assignment process. . . . In many ways, President Clinton[']s budget takes a position similar to the Bush and Regan administrations. It has long been the view of NTIA and the FCC that the Commission[']s current process of spectrum assignment by lottery and comparative hearings is flawed. This view holds that not only do current licensing procedures often result in arbitrary and inefficient spectrum management decisions, but also, by assigning spectrum to non-federal licensees without receiving compensation, the government is failing to manage wisely one of the nations most valuable national resources.

H.R. Rep. No. 103-111, pt. 2 (1993).

adjudication or random allocation at no charge to the licensee for the license.[13] In carrying out this mandate — selling licenses at their full commercial value and structuring the sale as a typical commercial transaction — the FCC placed itself, in respect of those transactions, on the same plane as other sellers or financers of goods, services or other things of value. It makes no difference whether the FCC's action in selling licenses to the highest bidder is considered to be regulatory action, as the Second Circuit would have it. The FCC, by design, adopted the form and substance of an ordinary commercial lending transaction. The FCC's actions as a commercial lender give rise to the same set of concerns as any other commercial transactions. Among those concerns are the consequences of financial distress experienced by a participant in the process and the need to provide both for the preservation of financially embarrassed but economically viable enterprises and for the protection of their creditors and investors. The Bankruptcy Code provides those protections.

By crossing over into the commercial financing arena and requiring successful bidders such as NextWave and UC-NC to pay full commercial value for the PCS licenses and then financing that acquisition, the FCC subordinated itself to the contract and other laws that regulate the affairs of commercial transactions. Put differently, the FCC could not responsibly or reasonably have determined that it could serve a regulatory purpose by entering into a full-fledged commercial transaction without also making the determination that it must accept all of the concomitants of a commercial transaction — of which the bankruptcy laws is one.

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13. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-392 (1993), amending Section 309 of the Communications Act of 1934 (codified in relevant part at 47 U.S.C. § 309(j)).

The FCC understands full well that the position it has taken in its litigation with C Block licensees is tenuous. It has lobbied Congress extensively during the pendency of this litigation to obtain an exemption from the Bankruptcy Code for its actions as a commercial lender which it claims to possess already and has sought retroactive application of the statute it has proposed for the purpose in order to nullify the action brought by C Block licensees.[14] Congress has repeatedly refused to grant the exemption to the FCC.[15]

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14. [Proposed] SEC. 618. Section 309(j)(8) of the Communications Act of 1934 is amended by adding new paragraph (D) as follows:

'(D) PROTECTION OF INTERESTS. —

'(i) Title 11, United States Code, or any otherwise applicable Federal or state law regarding insolvencies or receiverships, or any succeeding Federal law not expressly in derogation of this subsection, shall not apply to or be construed to apply to the Commission or limit the rights, powers, or duties of the Commission with respect to (a) a license or permit issued by the commission under the subsection or a payment made to or a debt or other obligation owed to the Commission relating to or rising from such a license or permit, (b) an interest of the Commission in property securing such a debt or other obligation, or (c) an act by the Commission to issue, deny, cancel, or transfer control of such a license or permit.

'(ii) Notwithstanding otherwise applicable law the Commission shall be deemed to have a perfected, first priority security interest in a license or construction permit issued by the Commission under this subsection

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> and the proceeds of such a license or permit for which a debtor or other obligation is owed to the commission under this Subsection.
>
> (iii) This paragraph shall apply retroactively, including to pending cases and proceedings whether on appeal or otherwise.'

S. 1217, 106th Cong. § 618 (1999).

15. The proposed amendment (footnote 14, *supra*) was included in S. 1217, a fiscal year 2000 appropriation bill for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies, which was passed by the Senate on July 22, 1999. *See* 145 Cong. Rec. S9068 (July 22, 1999). Under unanimous-consent agreement, S. 1217 was not engrossed but ordered to be held until the House companion measure, H.R. 2670, was received, and once received H.R. 2670 was to be amended by striking everything after the enacting clause and inserting S. 1217 in lieu thereof, and upon passage of H.R. 2670 by the Senate, S.1217 was to be vitiated and indefinitely postponed. *See* 145 Cong. Rec. S9046 (July 22, 1999). The Senate passed its amended version of H.R. 2670 on September 8, 1999, and passage of S. 1217 was subsequently vitiated and indefinitely postponed. *See* 145 Cong. Rec. S10540 (September 8, 1999); 145 Cong. Rec. D949-50 (September 8, 1999). The House version of H.R. 2670, which was passed on August 5, 1999, *see* 145 Cong. Rec. H7383-7384 (August 5, 1999); 1999 House Roll No. 387, did not contain the provision. The bills went to conference, and the provision was not included in the resultant conference report, *see* H. Rep. 106-398, which was agreed to by both the House and Senate on October 20, 1999, *see* 145 Cong. Rec. D1166 (October 20, 1999). The enrolled bill was presented to the President on October 22, 1999, *see* 145 Cong. Rec. H10768, and vetoed for sundry reasons on October 25, 1999, *see* 145 Cong. Rec. 10835.

III. Avoidance

In structuring and scheduling the C Block and subsequent license auctions, the FCC's directive from Congress was to ensure that those licenses were awarded to "small, emerging businesses".[16] Unquestionably, the FCC failed in that mission. Of the C Block licences allocated by Congress to small, emerging businesses, precious few have been put into service by such an entity. On the contrary, because of the strategy pursued by the FCC, the C Block licensees found themselves obligated to pay the FCC sums that vastly exceeded the actual market value of those licenses, as demonstrated by the results of the subsequent auctions and the refusal of the financial community to invest capital in C Block licensees. The C Block licensees are in need of a remedy that will place them in the position in which they would have been if the Congressional mandate had been carried out.[17] UC-NC respectfully submits that the avoidance

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16. *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311, 314 (S.D.N.Y. 1999), *rev'd and remanded*, 200 F.3d 43 (2d Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3774 (U.S. June 9, 2000) (No. 99-1980).

17. Section 548 of the Bankruptcy Code is one of the most powerful tools available to the bankruptcy trustee. It provides after the fact protection to the debtor's creditors, by undoing a transaction engaged in by the debtor, in which a transfer of the debtor's property was made, or an obligation was incurred by the debtor, which . . . was made while the debtor was in a precarious financial condition, and the transaction did not provide the debtor with a reasonably equivalent value in exchange for the item

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remedy is tailor-made to accomplish the Congressional purpose, as it requires successful bidders to pay only the actual value of the PCS licenses at the relevant time and permits the successful bidders to proceed to build out their systems and start serving the public. Far from negating the Congressional purpose, application of Section 548 of the Bankruptcy Code will further that purpose.

IV. Recent Pronouncements by this Court Support the Petition

NextWave argues forcefully that the Second Circuit erred in holding that Bankruptcy Court jurisdiction in this action is precluded by the grant of exclusive jurisdiction to the courts of appeal to review final orders of the FCC set forth in 28 U.S.C. § 2342 and 47 U.S.C. § 402.[18] Those statutes, NextWave argues, are superseded by 28 U.S.C. § 1334(b), which grants jurisdiction to the Bankruptcy and District Courts in bankruptcy proceedings "notwithstanding an act of Congress that confers exclusive jurisdiction on other courts."[19] NextWave's argument is supported by several very recent pronouncements of this Court.

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> transferred or the obligation incurred. The statutory language was drafted broadly to encompass virtually any type of transaction. Any act that has the effect of diminishing the value of the debtor's estate from the standpoint of creditors can be subject to a fraudulent transfer analysis.

5 *Collier On Bankruptcy*, ¶ 548.01 (Lawrence P. King ed., 15th ed. revised 2000).

18. Petition for a Writ of Certiorari, filed June 9, 2000, Docket No. 99-1980, at pp. 14-20.

19. *Id.*

In *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S. Ct. 1942 (May 30, 2000), this Court, interpreting 11 U.S.C. § 506(c), reaffirmed the principle that courts "begin with the understanding that Congress says in the statute what it means and means in the statute what it says there" and "when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms."[20] The party has an "exceptionally heavy" burden to overcome if the party proffers a statutory interpretation that contradicts the natural reading of the statute.[21] Policy arguments to the contrary are to no avail when a statute is clear, as it is for Congress to make policy decisions.[22] Application of these canons of construction mandate the conclusion that the unambiguous introductory sentence of Section 1334(b) of the Judicial Code, quoted above, removes, for purposes of that section, all limitations on the jurisdiction of bankruptcy and district courts found in other statutes.[23]

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20. *Hartford*, 120 S. Ct. at 1947 (internal quotation marks omitted) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (construing 28 U.S.C. §§ 158(d), 1291 and 1292) and *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (construing 11 U.S.C. § 506(b))).

21. *Id.* at 1948.

22. *See Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998) (construing Section 523(a)(6) of the Bankruptcy Code) ("Finally, the Kawaauhaus maintain that, as a policy matter, malpractice judgments should be excepted from discharge, at least when the debtor acted recklessly or carried no malpractice insurance. Congress, of course, may so decide. But unless and until Congress makes such a decision, we must follow the current direction of § 523(a)(6).").

23. The same pronouncements by this Court support NextWave's parallel argument with respect to Section 106(a) of the Bankruptcy

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The foregoing is consistent with the intent of Congress when it enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("the 1984 Act")[24] in response to this Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In *Northern Pipeline*, this Court found a part of the Bankruptcy Reform Act of 1978 ("the 1978 Act")[25] unconstitutional on the ground that the Act "vest[ed] all 'essential attributes' of the judicial power of the United States in the 'adjunct' bankruptcy court," a court not created under Article III of the Constitution.[26] In the 1984 Act Congress, rather than limiting the all-encompassing judicial power it had conferred on the bankruptcy courts in the 1978 Act, cured the constitutional defect by giving the full jurisdiction to the district court and permitting the district court, in its discretion, to refer to the

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Code, which provides that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to . . . Section [] . . . 544 [the fraudulent conveyance provision] . . . of this title," 11 U.S.C. § 106(a)(1), and further provides that "[t]he [bankruptcy] court may hear and determine any issue arising with respect to the application of . . . [Section 544] to governmental units," 11 U.S.C. § 106(a)(2)(6). If it is accepted that Congress meant what it said there, the jurisdiction of the bankruptcy and district courts in the instant avoidance action is in no way curtailed by anything contained in 28 U.S.C. § 2342 or 47 U.S.C. § 402(b), the two sections cited by the Second Circuit in support of its holding that the lower courts did not have jurisdiction of this action. *NextWave*, 200 F.3d at 54.

24. Pub. L. No. 98-353, 98 Stat. 364 (1984).

25. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

26. *Northern Pipeline*, 458 U.S. at 85.

bankruptcy court, giving the district court authority to control the exercise by the bankruptcy court of the jurisdictional referral.[27] Section 1334(b) was adopted nearly verbatim from the 1978 Act.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be granted, and, upon the appeal, the decision of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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27. 1 Collier on Bankruptcy, ¶ 1.02[2] (Lawrence P. King ed., 15th ed. revised 2000).